STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1137

Alex Batinich,
Appellant,

vs.

Arthur Renander, Zara Renander,
Respondents.

Filed May 25, 2010
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-04-7615

Scott Wilson, Shorewood, Minnesota; and

Gregory N. McEwen, McEwen Law Firm, Ltd., Inver Grove Heights, Minnesota (for appellant)

Karl J. Yeager, Jonathan D. Miller, Damon L. Highly, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Collins, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

On appeal from the district court's grant of summary judgment, appellant argues that the district court erred by (1) applying claim-preclusion doctrines because of prior, related litigation in Iowa, and (2) denying his motion to amend his complaint to join another defendant. We affirm.

FACTS

Respondents Arthur and Zara Renander, Minnesota residents, owned a parcel of land in Iowa which they swapped for an adjacent property owned by a real-estate development company. The real-estate company acquired respondents' property to be included in the development of a golf course. Respondents monitored the development's progress with the expectation of developing their neighboring land into residential lots. Several years passed without progress before the real-estate company offered respondents another land-swap opportunity aimed at facilitating development. Respondents agreed, believing that the second swap would provide more lucrative golf-front property. But the development was reconfigured to allow for construction of condominiums between respondents' property and the golf course, diminishing the value of respondents' property.

Respondents sued the real-estate company and the golf-course developer in Iowa district court. While negotiating settlement of this suit, respondents sought investors to purchase the entire parcel targeted for the golf course. The resulting Iowa district court settlement enabled respondents to purchase the property for $1.2 million. Respondents

and Northern Investments, LLC[1] then incorporated RAI, LLC to own and oversee the golf-course development. Appellant Alex Batinich, also a Minnesota resident, desired to invest in the golf-course development and purchased a 30% ownership interest in RAI for a total contribution of $300,000.[2] RAI ultimately structured the property purchase for $600,000 cash and a $600,000 mortgage.

When respondents refused to reveal their actual financial investment in RAI to the other investors, appellant sought declaratory relief in the state of Iowa to determine his ownership interests and to enjoin respondents from engaging in unilateral settlement negotiations in other pending litigation involving the property. Following a court trial in September 2005, the Iowa district court concluded that appellant had a 34% ownership interest in RAI. The court characterized appellant's claim as "a declaratory judgment [action] brought in equity to reform the [amended memorandum] entered into by the parties." The court concluded that appellant failed to establish the necessary elements of a fraudulent-misrepresentation claim. The Iowa district court found that while the investment information that respondents provided to appellant was "vague, evasive and misleading," it was not false. The court modified appellant's ownership interest only because the court viewed statements and conduct by respondents during the trial to constitute a stipulation that appellant was entitled to 34% interest. This decision was affirmed by the Iowa Court of Appeals.

---

[1] Northern Investments, owned by Gary Aamodt, contributed $340,000 toward the purchase. Neither Northern Investments nor Aamodt are part of this litigation. But Aamodt did file a separate action in Iowa shortly after appellant initiated the Iowa matter.

[2] Appellant's total contribution was reflected in an amended memorandum.

During the pendency of the Iowa action, appellant filed a claim against respondents in Minnesota district court, alleging fraudulent misrepresentation and consumer fraud. In September 2005, the district court approved a stipulation to continue the litigation until resolution of the Iowa action because that matter involved the same parties and the same issues. In March 2008, following resolution of the Iowa matter, appellant requested that the Minnesota case be reactivated. Appellant sought to amend his complaint by adding a breach-of-fiduciary-duty claim, which the district court allowed. Appellant also sought to join respondents' attorney responsible for legal work related to RAI as a defendant; the district court denied this motion.[3]

Respondents moved for summary judgment, arguing that appellant's claims were precluded by the doctrines of collateral estoppel and res judicata after the resolution of the Iowa action. The district court concluded that appellant's claims were precluded by res judicata. Although this conclusion was sufficient to warrant summary judgment, the district court concluded that appellant's misrepresentation claim was also barred by collateral estoppel. This appeal followed.

D E C I S I O N

Summary Judgment

This court considers two questions on appeal from summary judgment: (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4

[3] Appellant failed to serve respondents' attorney, whom he sought to join as a defendant, with notice of this appeal.

(Minn. 1990). Summary judgment is appropriately granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn R. Civ. P. 56.03. "We review de novo whether the doctrine of res judicata can apply to a given set of facts." *Erickson v. Comm'r of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992). "If the doctrine applies, the decision whether to actually apply it is left to the discretion of the [district] court." *Id.*

Res judicata is an absolute bar to "all claims *that could have been litigated* in [an] earlier action." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (emphasis added). A subsequent claim is precluded by res judicata when "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter." *Id.* The second factor is not in dispute.

Same Factual Circumstances

A common test to determine whether two claims share the same factual circumstances is "whether the same evidence will sustain both actions." *Id.* at 840-41. Appellant argues that the factual circumstances surrounding the misrepresentation claim are not identical to the Iowa matter because, after the conclusion of the Iowa proceedings, Mr. Renander testified in the action brought by Aamodt that some of the RAI investments were used to pay legal fees stemming from litigation not directly related to the property.

Appellant argues that this evidence contradicts testimony given by respondents in the Iowa action and broadens the scope of respondents' fraudulent misrepresentations.

This argument fails. The Minnesota Supreme Court has noted that when new facts intervene before the second suit and furnish a new basis for claims or defenses, the issues are no longer the same and the former judgment cannot bar the second action. *Federated Mut. Insur. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990). But respondents' testimony at the Aamodt trial does not furnish a new basis for a claim or defense. If anything, respondents' subsequent testimony could have potentially assisted appellant in proving that a material misrepresentation was made, but the evidence would still pertain to the identical issue litigated in the Iowa action. Accordingly, the issue of whether respondents made fraudulent misrepresentations to appellant presented in the Minnesota action is identical to the issue underlying appellant's declaratory-relief claim filed in Iowa.

In order to succeed under the Minnesota Consumer Fraud Act, appellant must demonstrate "[t]he act, use, or employment . . . of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise." Minn. Stat. § 325F.69, subd. 1 (2008). Appellant's amended complaint alleged that "[respondents] used fraud, false pretenses, misrepresentation, misleading statements, and deceptive practices, with the intent that [appellant] rely thereon, in connection with their marketing and sale of the [] property . . . . [Respondents'] false statements induced [appellant] into purchasing a share in the [] property and RAI, LLC." The amended complaint contains

four alleged misrepresentations not specifically pled in the Iowa action: that respondents (1) misrepresented themselves as successful real-estate investors; (2) misrepresented their intended use of appellant's investment; (3) failed to disclose taxes owed on the property; and (4) failed to disclose the significant amount of legal fees owed by RAI.

But this evidence was available during the Iowa matter, even if not yet discovered. More importantly, identical evidence would be required to substantiate a consumer-fraud claim as for the reformation action in Iowa, namely: appellant's testimony about respondents' alleged misrepresentations; respondents' real-estate history; respondents' litigation history; Aamodt's investment in the property; the lack of a separate bank account or annual meetings for RAI; and alleged self-dealings by respondents to pay legal fees unrelated to the property. It is unclear what, if any, circumstance or evidence would have supported appellant's consumer-fraud claim separate from the background of the Iowa proceeding. Appellant's consumer-fraud claim thus originated out of the same circumstances which gave rise to the Iowa action.

The basis for appellant's breach-of-fiduciary-duty claim was that respondents used RAI funds to pay personal attorney fees, engaged in self-dealing with their attorney, failed to comply with statutory requirements for LLCs including maintaining a bank account and financial records and holding annual meetings, and failed to pay property taxes. As the district court assessed, however, these issues arose out of respondents' representation to appellant which precipitated appellant's investment. The district court correctly concluded that evidence of these alleged breaches were addressed during either the depositions or the testimony taken at the court trial in the Iowa matter. Additionally,

appellant presented this exact argument to the Iowa Court of Appeals in an attempt to procure more than the 34% ownership interest awarded by the Iowa district court. Appellant appears to be trying to characterize claims available during the Iowa proceeding under a different legal theory. But a change in legal theory will not withstand a res judicata challenge. *Nitz v. Nitz*, 456 N.W.2d 450, 452 (Minn. App. 1990). As such, appellant's argument that the circumstances supporting the breach-of-fiduciary-duty claim are separate from the Iowa action fails. Thus, the Minnesota action and the Iowa action arose out of the same factual circumstances.

Final Judgment on the Merits

Appellant claims that because he moved for declaratory relief in Iowa, the Minnesota claim for damages resulting from a fraudulent misrepresentation is fundamentally different and thus no final judgment on the merits exists. The supreme court has held that a "declaratory judgment, like other judgments, may have either the effect of estoppel by verdict [collateral estoppel] or estoppel by judgment [res judicata]." *Howe v. Nelson*, 271 Minn. 296, 301, 135 N.W.2d 687, 692 (1965). Appellant argues that *Howe* is distinguishable, however, because *Howe* and its progeny bar the relitigation of a contract, usually an insurance policy, and should be applied only in this narrow context.

This argument is unavailing. Although *Howe* involved actions between insurance carriers over the issue of insurance coverage, the supreme court did not limit its holding to state that declaratory judgments may serve as the basis for claim preclusion solely in contract or insurance claims. *See id.* at 303-04, 135 N.W.2d at 692-93. Conversely, the

court expansively concluded that "[t]he res judicata effect of a judgment in a declaratory judgment action is essentially no different from the res judicata effect of any other judgment." *Id.* at 301, 135 N.W.2d at 691. The supreme court noted that this conclusion is supported by the Restatement of Judgments, which provides that when "an action is brought to obtain a declaration of the rights or other legal relations of the parties to the action . . . a final and valid judgment declaring such rights or other relations is binding between the parties in subsequent actions." Restatement of Judgments § 77 (1942); *Howe*, 271 Minn. at 302, 135 N.W.2d at 692. Accordingly, the declaratory nature of appellant's Iowa action does not avert an application of res judicata to the Minnesota action, and the requirement of a final judgment on the merits was satisfied here.

Full and Fair Opportunity to Litigate

A party enjoyed a full and fair opportunity to litigate in the context of a res-judicata analysis when: (1) there were sufficient procedural safeguards in the prior proceeding; (2) the party had the incentive to fully litigate the issue; and (3) effective litigation was not limited by the nature of the parties. *State v. Joseph*, 636 N.W.2d 322, 328 (Minn. 2001).

The Iowa action was preceded by months of discovery and included witness testimony and cross-examinations. This proceeding provided sufficient procedural safeguards to satisfy the first element. *See State by Friends of the Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 590 (Minn. App. 2008) (holding that a city-council hearing where parties presented only written argument and evidence constituted adequate procedural safeguards), *review denied* (Minn. Sept. 23, 2008). Appellant also had

incentive to fully litigate the issue—establishing respondents' fraud would have supported the reformation of the amended memorandum and resulted in a greater ownership interest for appellant. And appellant could have amended his complaint to include a breach-of-fiduciary-duty claim beyond the declaratory relief sought, as he did in Minnesota; he just chose not to do so. Finally, both parties were represented by counsel in the Iowa action and thus effective litigation was not limited by the nature of the parties. Appellant had a full and fair opportunity to litigate his claims in the Iowa action.

The district court did not err in concluding that res judicata barred appellant's claims for misrepresentation, breach of fiduciary duty, and consumer fraud. Accordingly, summary judgment was appropriately granted in favor of respondents. Because we conclude that res judicata effectively barred appellant's fraudulent-misrepresentation claim, we do not address the district court's application of collateral estoppel. *See Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995) (stating that we may affirm summary judgment on any grounds), *review denied* (Minn. Feb. 13, 1996).

Motion to Join Respondents' Attorney as a Defendant

Appellant also argues that the district court erred by refusing to allow appellant to join respondents' attorney as a defendant. As noted, appellant failed to serve this individual with notice of appeal. "An appeal shall be made by filing a notice . . . and serving the notice on the adverse party . . . ." An adverse party is one "whose interest in relation to the subject of the appeal is in direct conflict with a reversal or modification of the order . . . from which the appeal is taken." *Peterson v. Joint Indep. Consol. Sch. Dist.*

No. 116, 239 Minn. 233, 236, 58 N.W.2d 465, 467 (1953). "It is well-established that failure to serve notice of appeal on an adverse party means that the appellate court cannot alter the judgment as to that party." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005). Because a reversal of the district court's denial of appellant's motion to join respondents' attorney as a defendant would be in direct conflict with his interest in this appeal, he should have been served with notice of the appeal. Accordingly, this court cannot alter the district court's judgment as it relates to respondents' attorney.

Affirmed.